90-694

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH DANIEL BROCKINGTON
and SYLVIA BROCKINGTON,
Petitioners,

v.

CERTIFIED ELECTRIC, INCORPORATED,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the exclusive remedy provision of the Georgia Workers' Compensation statute can be applied to preclude petitioners from asserting a tort remedy provided under the General Maritime Law as governed by Article III, § 2, Cl. 1 of the United States Constitution. The United States Court of Appeals for the Eleventh Circuit held that the Georgia Workers' Compensation statute can be so applied.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Petitioners Joseph Brockington and Sylvia Brockington respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on the 26th day of June, 1990.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The opinion of the District Court also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on the 26th day of June, 1990. A timely petition for rehearing en banc was denied on the

16th day of August, 1990, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, § 2, Cl. 1 of the United States Constitution.

28 U.S.C. § 1333.

O.C.G.A. § 34-9-11 (Georgia).

STATEMENT OF THE CASE

Petitioner Joseph Daniel Brockington is an electrician who was employed at the time of this incident by Respondent Certified Electric, Incorporated which is a corporation engaged in electrical contracting work in Glynn County, Georgia.

In May of 1985, Respondent Certified Electric, Incorporated was hired to do electrical work on Sapelo Island, a coastal barrier island off the coast of Georgia. There is no land route to this island so all personnel and materials must be transported by boat.

Petitioner Joseph Daniel Brockington was instructed by his employer Respondent Certified Electric, Incorporated to go to Sapelo Island on a boat owned and operated by a fellow employee, David Ferrell. They were to perform work on Sapelo Island.

On the morning of May 15, 1985, Petitioner Joseph Daniel Brockington was returning from Sapelo Island in Ferrell's boat on navigable water. They entered the Intra Coastal Waterway. Due to a wake, Petitioner was thrown down into the boat and, as a result, he suffered severe injuries.

Respondent Certified Electric, Incorporated and its workers' compensation insurer voluntarily began payment of workers' compensation benefits under the Georgia

Workers' Compensation Statute. No questions concerning the jurisdiction of the State Board of Workers' Compensation were ever raised.

On May 6, 1988, Petitioners filed suit against Respondent Certified Electric, Incorporated in United States District Court under the General Maritime Law alleging that Certified's negligence caused Petitioner's injuries.

On April 18, 1989, the District Court granted Respondent Certified's Motion for Summary Judgment, holding that, although the Court had admiralty jurisdiction under the General Maritime Law, the Petitioners were precluded from bringing this action by Petitioner Joseph Daniel Brockington's receipt of workers' compensation benefits under the Georgia Workers' Compensation Statute's exclusive remedy provision.

The United States Court of Appeals for the Eleventh Circuit affirmed, adopting the District Court's opinion as its own.

REASONS FOR GRANTING THE WRIT

As stated in prior Supreme Court decisions, State law cannot be applied to preclude or supplant remedies and causes of action provided under Federal law and the United States Constitution and thus the Court of Appeals decision creates a serious intrusion of State law into an area of exclusive Federal regulation.

In its decision, the District Court stated:

> "Having considered the competing interests surrounding the present action, the Court finds that the state has a strong interest in application of its workers' compensation law with no comparable interest to tip the balance in favor of application of general maritime law. Because Brockington has recovered under the statute, the exclusivity provision precludes any further recovery and Certified's Motion for Summary Judgment will be granted."

Federal Admiralty jurisdiction finds its source in Article III, Section 2 of the United States Constitution, which extends the judicial power "to all cases of Admiralty and Maritime jurisdiction." Congress implemented this jurisdictional grant in what is now 28 U.S.C. § 1331(1).

In tort cases, Federal Admiralty jurisdiction was traditionally involved if the tort was "maritime", i.e., if the wrong occurred on navigable waters. *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1045 (11th Cir. 1989).

Determination of whether a tort was maritime thus depended upon the locality of the wrong. *The Plymouth*, 70 U.S. (3 Wall.) 20, 36, 18 L.Ed. 125 (1866).

In *The J.E. Rumbell*, 13 S.Ct. 498, 148 U.S. 12, 37 L.Ed. 345 (1893), the Supreme Court stated:

> "The Admiralty and Maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state."

In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), the Supreme Court stated that "while states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

In a case remarkably similar in its facts to the present case, the Supreme Court held that the exclusive remedy provision of a state workers compensation law would not preclude employees injured on an employer-operated ferry from bringing a claim under the General Maritime Law. *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 76 L.Ed. 903, 52 S.Ct. 450 (1932).

The Supreme Court states:

> "The workmen's compensation law of New Jersey, the purpose of which was to supersede the common

> law redress in tort cases and statutory right consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration."

The Supreme Court further states:

> "The compensation act is inapplicable to such a maritime tort, and the injured person is entitled to his remedy under rules recognized in admiralty."

Thus, under *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 76 L.Ed. 903, 51 S.Ct. 450 (1932), which petitioners contend is controlling precedent in this case, the recipient of benefits under a state workers' compensaton statute cannot be precluded by the exclusive remedy provision of that statute from asserting a remedy under the General Maritime Law for a tort which occurred on navigable waters.

The District Court in this case cited *P.J. Carlin Const. Co. v. Heaney*, 299 U.S. 41, 57 S.Ct. 75, 81 L.Ed. 27 (1936) for the proposition that general maritime law may be excluded by state law. That is an incorrect reading of the Supreme Court decision. What the Supreme Court said in that case was that a state may allow workers' compensation benefits to be paid for an injury which occurred on navigable water. The Supreme Court did not say that the state law might be applied to the exclusion of a tort remedy under the General Maritime law and in fact no admiralty tort remedy was being asserted in the case.

Since these Supreme Court decisions, a definite and distinct conflict has arisen between the various federal courts of appeal concerning whether the exclusive remedy provisions of State workers' compensation statutes can be applied to exclude or supplant a remedy under admiralty or general maritime law.

The United States Court of Appeals for the First Circuit, *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976), and the United States Court of Appeals for the Eleventh Circuit in this case have held that the exclusive remedy provision under a state workers' compensation law can preclude a federal maritime remedy.

The United States Court of Appeals for the Third Circuit, *Hagans v. Ellerman & Bucknall Steamship Company*, 318 F.2d 563 (3rd Cir. 1963), the United States Court of Appeal for the Fifth Circuit, *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), and the United States Court of Appeals for the Seventh Circuit, *Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971), have all held that the exclusive remedy provision of a state workers' compensation statute may not be applied to preclude a federal maritime law remedy.

In *Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971), the Seventh Circuit stated, while holding that the state workers' compensation law did not preclude the maritime remedy:

> "Conversely stated, is federal maritime law controlling as opposed to a state-created remedy, an exclusive remedy under state compensation act? This question has not yet been considered by the Supreme Court or this circuit."

Since the Seventh Circuit made this statement in 1971, the First, Fifth and Eleventh Circuits have all issued conflicting opinions on this issue.

Clearly this matter is ripe for resolution by the Supreme Court.

In *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976), the First Circuit stated:

> "The question, therefore, is whether in these interstices of admiralty tort jurisdiction, the Federal Courts should give effect to exclusivity features within the State workmens' compensation law that are comparable to those found in the federal law. We think the answer is in the affirmative."

In *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), the Fifth Circuit stated:

> "The foregoing authorities make clear that an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by Federal Maritime Law."

See also the Fifth Circuit decisions in *Roberts v. City of Plantation*, 558 F.2d 750 (5th Cir. 1977) and *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

The Seventh Circuit had held in *Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971) that the exclusive remedy provision of the Wisconsin workers' compensation statute could not preclude the assertion of a Federal Maritime remedy.

The District Court in this case applied a "competing interests" test to arrive at the conclusion that the State workers' compensation statute of Georgia should be applied to exclude the General Maritime law remedy. There is no support in prior decisions for any such theory.

This accident occurred in the Intracoastal Waterway where traditional maritime traffic was proceeding both between the states and between foreign countries. This is obviously an area where a uniform federal maritime law should prevail.

If the Supreme Court does not resolve this question, then, for example, a person injured in the territorial waters between Alabama (Eleventh Circuit) and Mississippi (Fifth Circuit) may or may not have a remedy under the General Maritime law depending upon which

state's territorial waters he is in even though he is in the Intracoastal Waterway.

In the case of the State of Georgia, there is no support anywhere in the Georgia statutes or Georgia Appellate Court decisions for the proposition that Georgia has any interest in affecting any causes of action that might arise under Maritime law.

The District Court's application of its "competing interests" test in its decision and the Eleventh Circuit's affirmance of it is particularly erroneous in light of the Supreme Court's most recent decision on the subject of the application of state workers' compensation "exclusive remedy" provisions. This is *Adams' Fruit Co., Inc. v. Ramsford Barrett*, 494 U.S. ——, 108 L.Ed.2d 585, 110 S.Ct. —— (1990). In that case, the Supreme Court held that the exclusive remedy provision in the Florida Workers' Compensation statute could not preclude migrant farm workers from bringing private actions against their employers under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 180, et seq.)

In summary, the Supreme Court held that, unless Congress specifically directs otherwise, state remedies must be regarded as supplementing rather than supplanting Federal remedies and states cannot preclude federal remedies by establishing state workers' compensation remedies as exclusive.

There is no support whatever under federal law or state law for the theory that the Congress or the authors of the United States Constitution intended for state laws to preclude any rights or remedies under Admiralty and General Maritime law. Indeed, the opposite is true. The framers of the United States Constitution clearly intended for Federal law to prevail in this area.

The Eleventh Circuit decision in this case sets a dangerous precedent. It creates a major intrusion of state law into an area where there must be exclusive federal

regulation. If, for example, the State of Georgia can preclude a General Maritime law remedy through its State Workers' Compensation statute, there is conversely no reason why it could not create additional Maritime remedies not otherwise provided under Federal law.

Given the fact that there are conflicting opinions by at least (5) five different circuit courts of appeal, this matter should be resolved by the Supreme Court.

CONCLUSION

The decisions of the lower courts are in error on an important point of constitutional law and therefore the Petition for Writ of Certiorari should be granted and the decision of the lower courts should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-8373

JOSEPH DANIEL BROCKINGTON, *et al.*,
Plaintiffs-Appellants,

v.

CERTIFIED ELECTRIC, INC., GERALD RAINE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

June 26, 1990

Edward E. Boshears, Brunswick, Ga., for plaintiffs-appellants.

John T. Woodall, Marvin W. McGahee, Savannah, Ga., for Gerald Raine.

Douglas M. Muller, Robert S. Glenn, Jr., Hunter MaClean Exley & Dunn, P.C., Savannah, Ga., for Certified Elec., Inc.

Before TJOFLAT, Chief Judge, VANCE *, Circuit Judge, and ALLGOOD **, Senior District Judge.

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* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

** Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

We affirm the district court's summary judgment in favor of appellee Certified Electric, Inc. for the reasons stated in the relevant portion of its April 18, 1989 order set out in the appendix. We affirm the court's summary judgment in favor of appellee Gerald Raine because no genuine issue of material fact exists and under the applicable law appellants are entitled to no relief. *See* 11th Cir.R. 36-1.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. 288-111

JOSEPH DANIEL BROCKINGTON and SYLVIA BROCKINGTON,
Plaintiffs

v.

GERALD RAINE,
Defendant

and

CERTIFIED ELECTRIC, INC.,
Defendant and
Third-Party Plaintiff

v.

DAVID FERRELL,
Third-Party Defendant

ORDER

[Filed Apr. 18, 1989]

Joseph Daniel Brockington and Sylvia, his wife, bring this action to recover damages for an injury sustained by Brockington on the "navigable" waters of the Intracoastal Waterway in the course of his employment with Certified Electric, Inc. ("Certified"). Brockington, who has already received compensation for his injury pursuant to the Georgia Workmen's Compensation Act, O.C.G.A. § 34-9-1, *et seq.*, now seeks an independent recovery against Certi-

fied as his employer, pursuant to section 5(b) of the federal Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and general maritime law. Plaintiffs also bring this action for negligence against Gerald Raine, who was the owner and operator of the boat which allegedly caused the accident. David Ferrell, Brockington's co-worker and owner/operator of the boat in which Brockington was riding at the time of his injury, was subsequently added as a third-party defendant by Certified pursuant to Fed.R.Civ.P. 14(c).

Now before the Court are Certified's and Raine's motions for summary judgment. The Court finds that the material facts are not in dispute with respect to Certified's position and that it is entitled to judgment pursuant to both the LHWCA and general maritime law. Accordingly, Certified's motion for summary judgment will be granted. Because material facts remain in dispute with respect to plaintiffs' claim against Gerald Raine, however, Raine's motion for summary judgment will be denied.

FACTS

Joseph Daniel Brockington lived in Brunswick, Georgia, and in May 1985, had been employed as a land-based journeyman electrician by Certified (also located in Brunswick) since 1975. His duties primarily consisted of wiring houses and commercial and industrial buildings. In connection with these duties, he also dug ditches, ran conduit, pulled cable and wired electrical fixtures.

The incident which forms the basis for this action took place on May 15, 1985. Certified had contracted with the University of Georgia to do wiring work at a marine laboratory which was being built on Sapelo Island, off the coast of Georgia. The lab was being built entirely upon the land. Because there is no bridge to the island, it was necessary for the workers to travel to the island aboard the "Sapelo Queen" ferry. Workers had encountered difficulties because the ferry made only a limited number of

trips back and forth, thereby limiting their access to the island and to their materials and equipment. For this reason, David Ferrell, also an electrician with Certified, suggested using his own 16-foot motorboat to transport materials to the island. Certified gave Ferrell permission to do so and agreed to reimburse him for gas, oil and dockage fees. Although Ferrell had made the trip prior to May 15, 1985, Brockington was making the trip for the first time.

According to Brockington, he met Ferrell at approximately 7:30 a.m. on May 15, 1985, at Ferrell's home in Darien, Georgia. They proceeded, with Ferrell's boat, to the marina where they loaded it with the supplies and equipment they would need on Sapelo. Ferrell maintains, however, that they met at the marina where the boat was already located. At any rate, after loading the boat, they proceeded to Sapelo Island; Ferrell operated the boat while Brockington, who states that he looked at the electrical plans and checked the tools on the way over, acted as a passenger. While Brockington states that they left the dock at approximately 8:00 a.m., Ferrell recalls leaving sometime between 8:30 and 8:45 a.m.

At this point, the versions of the facts begin to differ in material respects. While Ferrell recalls that the incident which forms the basis for this lawsuit occurred on the way to Sapelo, Brockington maintains that they had already been to the island, unloaded materials and were on their way back to the marina to get more supplies when the incident took place. Ferrell states that it occurred as his boat entered the Intracoastal Waterway from an intersecting river and unexpectedly encountered a wake of approximately four feet, caused by a larger passing vessel which he had been unable to see prior to entering the Waterway because a curve in the river obstructed his view. When Ferrell's boat, which was traveling at approximately 20-25 m.p.h., hit the wake, the seat upon which Brockington was sitting became unfastened and slid to

the back of the boat, apparently causing Brockington to fall. Ferrell states that, at approximately the same time his boat hit the wake, he looked to his left and saw the back of a yacht (the only boat in sight) approximately 100-150 yards away. The only thing he noticed was that one person was on the very top of the boat.

Brockington's recollection of the accident is somewhat different. He states that Ferrell's boat met the cabin cruiser head-on. To avoid a collision, Ferrell maneuvered his boat to the left and the larger boat passed on their right side. According to Brockington, when the boats were approximately even, Ferrell made a 90-degree turn directly into its wake. It was at that point that Brockington's seat became unfastened and slid to the back of the boat. Although he did not notice its name or any other identifying marks, Brockington recalls seeing two people on the second deck of the cabin cruiser, which he later identified as being nearly identical to a diagram of a Viking motor yacht.

Ferrell's and Brockington's recollection of the facts converge once again following the accident. Complaining of back pain, Brockington requested that they return to the marina. Upon their arrival, he informed his employer that he was unable to continue working and returned home to Brunswick. Brockington has not returned to work since then.

According to their log, Gerald Raine and his wife left the Golden Isles Marina in St. Simons Island, Georgia, aboard their yacht, the "Empty Pockets III," at approximately 9:30 a.m. on May 15, 1985, and proceeded north on the Intracoastal Waterway. They arrived at the Thunderbolt Marina in Thunderbolt, Georgia, at 2:45 p.m. That 93-mile leg of their journey from Fort Lauderdale, Florida, to the Chesapeake Bay was made at an average speed of 17.7 m.p.h. Although plaintiffs contend that the "Empty Pockets III" was the only boat of its kind

which would have been in the vicinity of the incident at the time it occurred, neither Raine nor his wife recalls anything unusual about their journey that day, and maintain that they were traveling too slowly to have been in the area at the time of the incident.

Following the accident, Brockington applied for and initially received approximately $46,000 in state worker's compensation benefits, consisting of about $26,000 in medical benefits related primarily to back surgery he underwent as a result of the injury he sustained in his fall, and $19,000-$20,000 in compensation benefits. Certified and its insurance carrier brought a separate proceeding to contest the amount of benefits Brockington was receiving because of his perceived lack of cooperation with rehabilitation therapists. In final settlement of Brockington's claims, Certified and the insurer agreed to pay him an additional $40,000 plus open medical expenses for a period of one year.

DISCUSSION

Plaintiffs originally invoked federal jurisdiction of their action, contending that Brockington was a "maritime employee," entitled to recover pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* Whether plaintiffs continue to argue this is unclear, but irrelevant, given the Court's determination, *infra*, that Brockington is not entitled to coverage under the LHWCA. Plaintiffs also invoke the admiralty jurisdiction of the Court for their claim under general maritime law.

Certified moves for summary judgment, arguing, first, that Brockington was not a "maritime employee" for purposes of the Act. Certified argues further that this claim is not cognizable under the Court's general maritime jurisdiction but that, even if it were, plaintiffs' claims are barred because they have already been compensated under the exclusive provisions of the Georgia Workmen's Compensation Act.

Summary judgment requires the movant to establish the absence of genuine issues of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 26 L.Ed.2d 142, 152 (1970). Summary judgment is also proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed.2d 265, 273 (1986).

The Court should consider the pleadings, depositions and affidavits in the case before reaching its decision, Fed.R. Civ.P. 56(c), and all reasonable inferences will be made in favor of the nonmovant. *Adickes*, 398 U.S. at 158-59, 26 L.Ed.2d at 155.

(A) *LHWCA*

Plaintiffs originally brought this action under the LHWCA and, while they now appear willing to stipulate that the LHWCA does not apply, it is not entirely clear whether they have dropped their claim under it. Moreover, defendants argue that, if plaintiffs' claims are cognizable under the Court's maritime jurisdiction, the LHWCA would correctly be applicable as plaintiffs' exclusive remedy. Because the Court finds that Brockington was not a "maritime employee" at the time he was injured, he is not entitled to proceed under the LHWCA.

The LHWCA, originally enacted in 1927, was amended in 1972. The effect of the 1972 amendments was to expand coverage of the Act to include longshoremen, harborworkers and others who were not actually physically on the water at the time of their injury. Where, prior to 1972, the LHWCA:

> reached only accidents occurring on navigable waters, the amended [Act] expressly extended coverage to "adjoining area[s]." At the same time, the amended

> definition of an "employee limited coverage to employees engaged in "maritime employment."

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 420, 84 L.Ed. 2d 406, 105 S.Ct. 1421 (1985). The rationale underlying the amendments was that such employees, regularly exposed to the type of risks intended to be protected by the LHWCA, should not be foreclosed from recovery merely because they happened to be performing their duties on land at the moment of their injury. Section two of the LHWCA was amended in 1984 to further clarify the definition of covered employees; specifically excluded were certain categories of workers not engaged in maritime occupations or exposed to classic maritime hazards. The 1984 amendments were intended to:

> insure stability for both the employer and the employee. The employer needs to know its obligations with respect to workers' compensation for its employees, and make plans accordingly. Employees should not fall within the coverage of different statutes because of the nature of what it is that they were doing at the moment of injury.

H.R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 6, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2739.

These amendments have been interpreted to require persons bringing claims under the Act to fulfill a two-prong test consisting of a "status" as well as a "situs" component. The fact that Brockington suffered some injury on the "navigable waters" of the Intracoastal Waterway has never been disputed; thus, there is no need to dwell on the issue of situs. The real question is whether Brockington fulfills the second prong, which concerns "status" of the injured party.

The Supreme Court most recently addressed the question of "status" in *Herb's Welding, Inc. v. Gay, supra*, stating that the injured party must be engaged in "mari-

time employment." In denying LHWCA coverage to a welder injured on a fixed offshore oil-drilling platform, the Court focused on an "occupational test," stating that:

> [t]he Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.

Id. at 424, *citing* H.R. Rep. No. 92-1441, p. 11 (1972); S. Rep. No. 92-1125, p. 13 (1972). In holding that the welder did not fulfill the "status" requirement of the LHWCA, the Court found that there was nothing "inherently maritime" about the tasks he performed; that their nature was not significantly altered by the marine environment"; and that, in fact, "welding work was far removed from traditional LHWCA activities." *Id.* at 425. Although the Court declined to address the question of coverage by the LHWCA of an employee whose job was entirely land-based but who took a boat to work, *id.* at 427 n.13, this Court finds sufficient guidance to be able to answer that question given the facts of the present action.

The question which must be answered is whether, at the time of his injury, Brockington was engaged in maritime employment sufficient to fulfill the "status" requirement. In order to answer this question, one must determine whether "employment" is defined by what he was doing at the *moment* he was injured, *or* whether it is defined by the nature of employment in which he was *generally* engaged. This question was addressed by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), where it held that the question of whether an individual is a maritime employee for purposes of LHWCA coverage is controlled by analysis of his "basic" employment, rather than the employee's particular work at the moment of the accident. Therefore, Brockington's

argument that he "loaded and unloaded" materials from the boat at the time of his injury is largely irrelevant.[1] What matters to a determination of maritime status is the description of his *regular* employment.

The undisputed facts indicate that Brockington was employed by Certified as a land-based electrician. His duties consisted primarily of wiring houses and commercial buildings. Brockington had no connection to traditional "loading and unloading" activity in the course of his employment with Certified or at any other time. There was nothing inherently maritime about his tasks as an electrician, and the "marine environment" in which he was injured had absolutely no connection to the general nature of his employment. It was merely his mode of travel to this particular jobsite. Furthermore, it cannot even be said that Brockington regularly traveled over water to more than two jobsites in the ten years he was employed by Certified. His only connection with the water was the fact that he happened to be traveling over it *incidental* to land-based employment.

Although Brockington was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his *de minimis* connection to maritime activity is simply insufficient to fulfill the "status" requirement of the LHWCA. Consequently, Certified's motion for summary judgment on plaintiffs' claim under the LHWCA will be granted.

(B) *General Maritime Law*

(1) *Jurisdiction*

Federal courts have been given jurisdiction over claims in admiralty in recognition of the important national interest of fostering "uniformity of law and reme-

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[1] The Court in *Herb's Welding, Inc. v. Gray, supra* at 425, held such activity to be "far removed from traditional LHWCA activities."

dies for those facing the hazards of waterbourne transportation." *Kelly v. Smith*, 485 F.2d 520, 526 (5th Cir. 1973).

To invoke the admiralty jurisdiction of the federal courts in a personal injury action, the situs of the injury is important; however, jurisdiction depends upon more than the mere fact that the accident occurred on the "high seas or navigable waters." *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 90 L.Ed.2d 865, 106 S.Ct. 2295 (1986). While there is no dispute that the incident which forms the basis for this action took place on navigable waters, fulfilling this jurisdictional situs requirement, an additional requirement dictates that a federal court may properly exercise such jurisdiction over an action only when there is also a "significant relationship" between the alleged wrong and "traditional maritime activity." *Id., citing Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 268, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972). While this requirement is not as stringent as the "maritime employment" requirement of the LHWCA, there must be some nexus between the activity and the concerns intended to be protected through the grant of admiralty jurisdiction.

The court in *Kelly* set forth four factors which should be taken into consideration to determine whether the requisite relationship exists: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) the traditional concepts of the role of admiralty law. *Id.* at 525. Analyzing the present action in terms of these factors, the Court is convinced that it properly retains jurisdiction.

At the time of the incident, Brockington and Ferrell were functioning, respectively, as passenger and operator of a 16-foot boat and were in the process of motoring between mainland Georgia and Sapelo Island, Georgia.

The injury was caused when Ferrell's smaller boat hit a large wake left by a 42-foot yacht (allegedly operated by Gerald Raine). The resulting jolt caused the chair upon which Brockington was seated to become unfastened and slide to the back of the boat. Knocked off balance, Brockington fell and hurt his back. The circumstances under which Brockington was injured are exactly the type contemplated as being the particular hazard of traveling upon the water and clearly within the purview of the traditional role of admiralty law. Because the facts of the present action meet the "substantial relationship" test as set forth in *Kelly*, the Court properly retains jurisdiction under general maritime law.

(2) *The Law*

Having determined that this action is properly within the Court's admiralty jurisdiction, we now turn to the question of what law to apply. Plaintiffs argue that general maritime law will apply to their tort claims against Certified based upon the doctrine of *respondeat superior*. Certified, on the other hand, maintains that recovery by plaintiffs under general maritime law is proscribed because Brockington, who had contracted for employment pursuant to the Georgia Workmen's Compensation Act, O.C.G.A. § 34-9-1 *et seq.*, has already been compensated under its exclusive provisions.

The general rule is that with admiralty comes the application of substantive admiralty law and, absent a relevant statute, the general maritime law,[2] as developed by the judiciary, will apply. *East River S.S. Corp. v. Transamerica Delaval, supra* at 864 (citations omitted).

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[2] Ostensibly a "uniform" body of law, the "general maritime law" is drawn from both state and federal sources and is an "amalgam of traditional common-law rules, modifications of those rules, and newly created rules" which includes a "body of maritime tort principles." *East River S.S. v. Transamerica Delaval, supra* at 865.

As is the case with most general rules, there are exceptions to the usual supremacy of federal maritime law. In fact, the Supreme Court pointed out that "the claim of federal supremacy [in admiralty cases] is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight." [3] *Kossick v. United Fruit Co.*, 365 U.S. 731, 739, 6 L.Ed.2d 56, 81 S.Ct. 886 (1961). Consequently, federal courts sitting in admiralty should, according to the dictates of comity, acknowledge and protect state-created rights, even at times to the exclusion of an existing maritime law.

In order to determine whether to give effect to a state law to the exclusion of a conflicting admiralty law, courts have generally used a balancing approach. In *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986), the court suggested the following method for resolving such conflicts:

> One must identify the state law involved and determine whether there is an admiralty principle with which the state law conflicts, and, if there is no such admiralty principle, consideration must be given to whether such an admiralty rule should be fashioned. If none is to be fashioned, the state rule should be followed . . . . *If there is a[n] admiralty-state law conflict, the comparative interests must be considered*—they may be such that admiralty shall prevail . . . or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect . . . .

Emphasis added (citations omitted).

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[3] According to Judge Hand, writing for the court in *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732, 734 (2d Cir. 1955), "exceptions to the paramountcy of the maritime law have always been recognized."

Such a conflict has arisen in the present personal injury action. Plaintiffs urge the Court to apply general maritime law, in which actions for personal injury are generally cognizable. The provisions of Brockington's employment contract, incorporating Georgia worker's compensation law, would operate, on the other hand, to preclude this action. The Georgia law provides:

> The rights and remedies granted to an employee by this Chapter shall *exclude all other rights and remedies* of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death . . . .

O.C.G.A. § 34-9-11 (emphasis added). The evident conflict compels the Court to apply the *Steelmet* balancing analysis to take into consideration the comparative interests in applying one body of law over the other.

An initial analysis indicates that the driving consideration underlying the preference for application of federal maritime law in admiralty cases is promotion of uniformity in that body of law. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917); *but see Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds*, —— U.S. ——, 100 L.Ed.2d 127, 108 S.Ct. 1684 (1988) (uniformity, not an end in itself, otherwise state law would *always* be preempted). The second consideration involves protection of statutorily or judicially created federal rights. *See Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970) (establishing wrongful-death action in general maritime law); *East River S.S. v. Transamerica Delaval, supra* (establishing products liability action in general maritime law). A final, increasingly insignificant, consideration is the

traditional inclination to allow plaintiffs to prevail in personal injury or wrongful-death maritime tort claims. *See Exxon Corp. v. Chick Kam Choo, id.* at 318.

Countervailing state interests include the interest in being permitted to regulate independently matters of local concern without interference by the federal government, *see Askew v. American Waterways Operators*, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973) (state law will not be preempted when the law regulates behavior in which the state has an especially strong interest; for example, police power), and in having state-created rights and obligations protected and enforced in actions in federal court. *See Just v. Chambers*, 312 U.S. 383, 388, 85 L.Ed. 903, 61 S.Ct. 687 (1941).

(a) *General Maritime Law*

In light of these considerations, plaintiffs maintain that general maritime law should be applied. They argue that the federal judiciary has established a policy of applying general maritime law over state worker's compensation law in admiralty actions; to do otherwise would result in the disturbance of uniformity.

While it is well established that state law must " 'yield to the needs of a uniform federal maritime system when inroads by the state cause disharmony,' " *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 847 (5th Cir. 1978), *citing Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959), it is also recognized that uniformity simply for the sake of uniformity serves no inherent good. *See Exxon Corp. v. Chick Kam Choo, supra.*

In support of plaintiffs' argument that the limitations of the workers' compensation law should not be given effect in this admiralty action, they cite the Fifth Circuit decisions of *Thibodaux v. Atlantic Richfield Co.*,[4] *King v.*

[4] 580 F.2d 841, 847 (5th Cir. 1978).

Universal Electric Constr.,[5] *Roberts v. City of Plantation*[6] and *Brown v. ITT Rayonier, Inc.*[7]

These admiralty cases, similar to the present action in some respects, are distinguishable. Both *Thibodaux* and *King* involved actions for wrongful death by widows of employees who were killed while working on navigable water. Although the decedents were not Jones Act seamen or longshoremen, the courts held that, under *Moragne*, the exclusive remedy of the Louisiana worker's compensation statute was preempted by federal maritime law to permit action for wrongful death. In *Roberts*, the court reversed the district court's dismissal of an action by a city policeman who was injured by a "fusillade of coconuts" thrown at him by "young hooligans" as he patrolled a canal in a city vessel. The court stated that, if he could show himself entitled to a maritime remedy under the Jones Act, the worker's compensation statutes would not apply. The Court in the present action has already determined that plaintiffs are not entitled to a remedy under a federal maritime statute. Finally, while the court in *Brown* did, indeed, disregard the state worker's compensation statute in favor of permitting an action in general maritime law, it is distinguishable in the sense that recovery was based not upon negligence but, rather, upon a claim of unseaworthiness, a right peculiar to the law of admiralty. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.Ed 1099, 66 S.Ct. 872 (1946). A critical fact distinguishes those cases from the case presently before the Court: while they involve tort actions for negligence, they are not actions for personal injury but for wrongful death, for which the Supreme Court specifically created a cause of action in general maritime law.[8]

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[5] 799 F.2d 1073 (5th Cir. 1986).

[6] 558 F.2d 750 (5th Cir. 1977).

[7] 497 F.2d 234 (5th Cir. 1974).

[8] Stressing the need for uniformity in light of the discrepancies resulting from judicial attempts to accommodate state wrongful

Analysis of the decisions indicates that the Louisiana worker's compensation statute at issue in each of the cases would have operated to prevent any recovery for wrongful death, in direct contravention of the Court's intention, as stated in *Moragne*, to establish the right to such a recovery. Such a result would intrude upon the uniformity of the general maritime law and additionally violate the general policy of permitting recovery by plaintiffs.

Applying the Georgia worker's compensation statute to the present action implicates none of the same concerns. First, while maritime law generally permits recovery for personal injury as a maritime tort, the Supreme Court has stated that:

> the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of maritime law or inconsistent with federal legislation.

Just v. Chambers, supra (enforcing a state survival of actions statute) (citations omitted); *see also Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973) (state tort law dealing with assault and battery and *respondeat superior* applied in admiralty action). Further, although the Court has encountered similar personal injury actions in admiralty, plaintiffs have pointed to no instances in which the Court has taken it upon itself to proscribe application of worker's compensation statutes in favor of general maritime law. To the contrary, the Supreme Court has given effect to state law to the exclusion of general maritime law. In *P.J. Carlin Const. Co. v. Heaney*, 299 U.S. 41, 81 L.Ed. 27, 57 S.Ct. 75 (1936), a construction worker was seriously injured when a vio-

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death remedies, the Supreme Court specifically declared that "an action does lie under general maritime law for death caused by violation of maritime duties," *see Moragne v. States Marine Lines, supra* at 409, thereby establishing a uniform policy to be followed by all federal courts hearing cases in admiralty.

lent explosion wrecked the ferry upon which he was traveling to an island jobsite. The Court ruled that the employment contract, providing for coverage under the New York worker's compensation laws, must be given effect because the parties and the accident were local; the contract had no direct relation to navigation; and to force it against the parties would not "materially interfere with the uniformity of any maritime rule." *Id.* at 44. *See also Grant Smith-Porter Ship Company v. Rohde*, 257 U.S. 469, 66 L.Ed. 321, 42 S.Ct. 157 (1922); *Miller's Indemnity Underwriters v. Braud*, 270 U.S. 59, 70 L.Ed. 470, 46 S.Ct. 194 (1926); *Alaska Packers Association v. Industrial Accident Commission*, 276 U.S. 467, 72 L.Ed. 656, 48 S.Ct. 346 (1928). It can hardly be argued that uniformity considerations would be implicated where there appears to be no uniform rule and, in admiralty cases where a rule of admiralty did not require uniformity, state laws have been accepted as the rules of decision. *See* S. Friedell, *Benedict on Admiralty, Jurisdiction* § 105 (7th rev. ed. 1988). Finally, unlike the statute with regard to an action for wrongful death, recovery for personal injury is not proscribed by the Georgia worker's compensation law, but, rather, is *specifically* provided. *Brockington*, who has already recovered more than $85,000 under the statute, has not been left without a remedy.

(b) *State Law*

While the interest in applying general maritime law to the present action is not substantial, the interest in applying state law is relatively high.

First, the action is peculiarly "local." The plaintiffs are local residents and Certified is a local operation. The accident occurred within state waters—as Brockington traveled between the Georgia mainland and Sapelo Island, one of Georgia's barrier islands. Moreover, Brockington contracted for employment pursuant to state law, with the

expectation that the Georgia worker's compensation laws would apply. Certified, likewise, acted according to the same expectation. Under nearly identical circumstances, the court in *P.J. Carlin Const. Co. v. Heaney, supra*, refused to interfere with application of the worker's compensation laws to a "local" action. *See also Palestina v. Fernandez*, 701 F.2d 438, 439 (5th Cir. 1983) (although the case for negligence was in the court's admiralty jurisdiction, "in all other respects . . . it [was] a garden variety state tort claim" in which it was appropriate to apply state law). Similarly, application of state law would result in no interference with federal maritime policy given the absence of conflicting statutory provisions and the lack of explicit support for a cause of action under these circumstances.

Furthermore, the state has a substantial interest in having its worker's compensation laws applied. Enactment of the Georgia Workmen's Compensation Act, O.C.G.A. § 34-9-1, *set seq.*, was intended by the Legislature to provide a means by which an employee and employer could, if they chose:

> escape entirely from . . . "personal injury litigation," through a system by which every employee not guilty of willful misconduct [could] obtain at once a reasonable recompense for injuries accidentally received in his employment, without lawsuit and without friction.

Brown v. Lumbermen's Mut. Casualty Co., 49 Ga.App. 99, 101 (1934). It has resulted in benefit for employees and employers alike. At the same time, it provides relief for injured employees through facilitation of "speedy, inexpensive, and final settlement of claims of injured employees." *Continental Casualty Co. v. Caldwell*, 55 Ga. App. 17, 18 (1937). It also protects employers from potentially excessive awards, *see Samuel v. Baitcher*, 247 Ga. 71, 73 (1981), and from further liability outside the Act. *See United States v. Aretz*, 248 Ga. 19, 20 (1981);

O.C.G.A. § 34-9-11. To foreclose operation of this statute in favor of application of maritime law would result in introduction of the very uncertainty sought to be avoided by parties who contract pursuant to the Act. Unable to anticipate all the other potential bases for recovery, an employer would avoid contracting pursuant to a statute which would hold it to its responsibilities but not provide the bargained-for protections.

Having considered the competing interests surrounding the present action, the Court finds that the state has a strong interest in application of its worker's compensation law with no comparable interest to tip the balance in favor of application of general maritime law. Because Brockington has recovered under the statute, the exclusivity provision precludes any further recovery and Certified's motion for summary judgment will be granted. With no specific protection in general maritime law, Sylvia Brockington's claim for loss of consortium is similarly prohibited by the exclusivity provision of the Act.[9] Likewise, there can be no action against Ferrel as a fellow employee.[10]

(C) *Gerald Raine*

Because actions against third-party tort-feasors are not precluded by the Georgia worker's compensation law,[11] plaintiffs' claim against Gerald Raine properly remains before the Court pursuant to its admiralty jurisdiction.

Raine moves for summary judgment, arguing, first, that the statute of limitations ran before plaintiffs brought

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[9] *See, e.g., Massey v. Thiokol Chem. Corp.*, 368 F.Supp. 668, 676 (S.D.Ga. 1973) (intent of Legislature is to bring "entire family group" within the coverage of the Act).

[10] *See Clements v. Georgia Power Co.*, 148 Ga.App. 745 (1979) (suits against a third person as a wrongdoer causing injury are barred if the third party is also an employee of the employer).

[11] *See Floyd v. McFolley*, 131 Ga.App. 4 (1974).

the action, and, second, that he is entitled to judgment under the equitable doctrine of laches because he has been substantially prejudiced by plaintiffs' failure to bring this action in a timely manner. Because the Court has already found plaintiffs' claims to be within its admiralty jurisdiction, the three-year statute of limitations, provided by the Uniform State of Limitations for Maritime Torts, 46 U.S.C. § 763(a), will apply. Plaintiffs brought their action within this limit and will, therefore, be allowed to maintain it. Furthermore, even had plaintiffs brought this action within a very short time after the incident, there is no guarantee that Raine would be any better equipped to defend against it, given his contention that he has no memory of the incident whatsoever.

Because substantial issues of material fact remain with respect to plaintiffs' claim against Raine, summary judgment would not be appropriate. Consequently, Raine's motion will be denied.

CONCLUSION

Because Brockington lacks the characteristics of a "maritime employee" such that he would qualify for coverage under the LHWCA, Certified's motion for summary judgment on plaintiffs' claim under the LHWCA is GRANTED. Likewise, Certified's motion for summary judgment with respect to plaintiffs' claims under general maritime law is GRANTED because the Georgia worker's compensation law operates to exclude any other recovery. The Clerk of Court is directed to enter an appropriate judgment on behalf of Certified Electric, Inc.

In accordance with the foregoing discussion, third-party defendant, David Ferrell, is hereby DISMISSED as a party to this action.

SO ORDERED, this 18th day of April, 1989.

Because material issues of fact remain with respect to plaintiffs' claim against Gerald Raine, Raine's motion for summary judgment is DENIED.

/s/ [Illegible]
Chief Judge
United States District Court
Southern District of Georgia

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

89-8373

D.C. Docket No. CV288-111

JOSEPH DANIEL BROCKINGTON, *et al.*,
Plaintiffs-Appellants,

versus

CERTIFIED ELECTRIC, INC., GERALD RAINE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

Before TJOFLAT, Chief Judge, VANCE *, Circuit Judge, and ALLGOOD **, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

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* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by quorum. *See* 28 U.S.C. § 46(d).

** Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Aug. 29, 1990

Entered: June 26, 1990

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Karleen McNabb
Deputy Clerk

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8373

JOSEPH DANIEL BROCKINGTON, *et al.*,
Plaintiffs-Appellants,

versus

CERTIFIED ELECTRIC, INC., GERALD RAINE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 26, 11th Cir., 1990, —— F.2d ——)

(Filed Aug. 16, 1990)

Before: TJOFLAT, Chief Judge, VANCE*, Circuit Judge, and ALLGOOD**, Senior District Judge.

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* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by quorum. *See* 28 U.S.C. § 46(d).

** Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge